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No. 031307

IN THE SUPREME COURT OF THE UNITED STATES

GWENDOLYN MITCHELL, Warden, *Petitioner,*

v.

MEGAN VAN LYNN, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has held, in the context of a request made "prior to trial," that a request for self-representation must be granted, so long as the defendant is competent to waive the right to counsel. *Faretta v. California*, 422 U.S. 806, 808, 834 (1975). In the third week of a four week trial, respondent sought to discharge her appointed counsel, and the trial court denied the request. The question presented is:

For purposes of the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254 (d)(1), is there clearly established federal law, as determined by this Court, recognizing a defendant's constitutional right to elect self-representation in the middle of a criminal trial?

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IN THE SUPREME COURT OF THE UNITED STATES

No.

GWENDOLYN MITCHELL, *Petitioner,*

v.

MEGAN VAN LYNN, Warden, *Respondent.*

PETITION FOR WRIT OF CERTIORARI

Gwendolyn Mitchell,[1/] Warden of the Central California Women's Facility at Chowchilla, California (hereafter "Warden"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the Court of Appeals (App. A1 to A12) is reported as *Van Lynn v. Farmon*, 347 F.3d 735 (9th Cir. 2003). The order of the district court granting the writ is unreported. (App. B1-B2.) The Findings and Recommendations of the magistrate judge are also unreported. (App. C1-C10.)

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1. Petitioner is Warden Gwendolyn Mitchell, the current custodian of respondent Megan Van Lynn. During prior proceedings, the warden was Teena Farmon.

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit Court of Appeals affirming the grant of habeas corpus relief was entered on October 17, 2003. The Court of Appeals denied the Warden's petition for rehearing with suggestion for rehearing en banc on December 16, 2003. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 2254 provides, in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . .

STATEMENT OF THE CASE

In the third week of a four week arson trial, respondent made a request for self-representation. The state trial court initially expressed concern about the timing of the request, but, after questioning respondent about her legal training and educational background, the court granted the request. Later, after further inquiry into respondent's ability to represent herself, the court denied the request. Trial proceeded with counsel and respondent was convicted. Respondent was found guilty by jury on December 9, 1993, of arson of an inhabited

structure, arson with the intent to defraud, and insurance fraud. Respondent was sentenced on January 7, 1994 to a term of 14 years in prison.

Respondent pursued a direct appeal but did not raise any issues relating to self-representation. That claim first appeared in her first state habeas corpus petition filed in Sacramento County Superior Court on January 3, 1996, and denied on May 9, 1996. She exhausted the claims by filing a state habeas corpus petition in the California Supreme Court on August 15, 1997, which was denied on procedural grounds on February 25, 1998.

In federal habeas, respondent claimed that the denial of her self-representation request violated *Faretta v. California*, 422 U.S. 806, 834. The magistrate judge agreed, reasoning that "[t]he basic rule which follows from *Faretta* is that a criminal defendant must be allowed to represent himself as long as he knowingly and intelligently elects to do so" (App. C7), and, therefore, "[t]he trial court denied petitioner's request for an impermissible reason; because the court did not feel that petitioner had the legal skill to adequately defend herself." (App. C8.) The district court adopted the Findings and Recommendations in full. (App. B2.)

In a published opinion, the Ninth Circuit held that the state court decision was contrary to clearly established Supreme Court law. (App. A2, A9, A11.) In particular, the Ninth Circuit expressly refused to address the argument that there was no clearly established Supreme Court case law regarding midtrial requests for self-representation. (App. A9-A10.) The Ninth Circuit explained its refusal to address the issue by noting that the state court denial was not based on timeliness grounds. (App. A10.)

REASONS FOR GRANTING THE WRIT

I.

THE TRIAL COURT'S DENIAL OF RESPONDENT'S MIDTRIAL REQUEST TO REPRESENT HERSELF BECAUSE SHE LACKED SUFFICIENT LEGAL EDUCATION AND TRAINING WAS NOT CONTRARY TO CLEARLY ESTABLISHED LAW SINCE *FARETTA* ONLY APPLIES TO PRETRIAL REQUESTS FOR SELF-REPRESENTATION

The Ninth Circuit found that the state court's denial of respondent's request to represent herself was contrary to clearly established law (see App. A2, A9, A11), relying on *Godinez v. Moran*, 509 U.S. 389 (1993) and *Faretta v. California*, 422 U.S. 806 (1975). However, there is no clearly established law regarding midtrial requests for self-representation. This Court has clearly established a right to self-representation if competently exercised prior to trial. 422 U.S. at 807, 808, 835. This rule was repeated and amplified in *Godinez*, in which this Court held, again in the pretrial context, that the competency standard for evaluating *pretrial* requests for self-representation is the same as the standard for standing trial. 509 U.S. at 392-395. This Court has also held that there is no right to self-representation after trial, on appeal. *Martinez v. Court of Appeal*, 528 U.S. 152, 154 (2000). This case represents a point in the middle of that pre-trial/post-trial continuum. This Court has never addressed whether there is a right to self-representation that may be exercised in the middle of trial.

Although the Ninth Circuit found that *Faretta* and *Godinez* were the "clearly established law" here (see App. A8), those decisions are silent as to whether or not it is appropriate for a trial judge to deny a mid-trial request for self-representation on the ground that the defendant does not have sufficient legal education or training. There is no clearly established law from

this Court that a right to self-representation even exists midtrial, let alone any clearly established law as to what the appropriate standards might be for the exercise of such a right.

In *Faretta*, this Court announced a narrow, fact-specific rule that defendants could discharge appointed counsel prior to trial and proceed pro se. "In forcing Faretta, under these circumstances, to accept against his will a state-appointed public defender, the California courts deprived him of his constitutional right to conduct his own defense." *Id.* at 836. This Court set forth the "circumstances" in the paragraph immediately preceding the holding:

> Here, *weeks before trial*, Faretta clearly and unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel.

Id. at 835, emphasis added.

In fact, this Court in *Faretta* made numerous references to the fact that the request was made before trial. "*Well before the date of trial*, however, Faretta requested that he be permitted to represent himself." *Id.* at 807, emphasis added. "Several weeks thereafter, but still *prior to trial*, the judge sua sponte held a hearing to inquire into Faretta's ability to conduct his own defense. . . ." *Id.* at 808, emphasis added. That this Court emphasized the pretrial nature of the request three separate times is strong reason to conclude it was a procedural fact material to the result.

The dissenting opinion by Justice Blackmun in *Faretta* is further evidence that this Court did not announce a right that could be exercised midtrial. He pondered the unanswered procedural questions raised by the decision:

> [T]he opinion leaves open a host of other procedural questions. Must every defendant be advised of his right to proceed pro se?. . . . How soon in the criminal proceeding must a defendant decide between proceeding by counsel or pro se? *Must he be allowed to switch in midtrial?*. . . . I assume that many of these questions will be answered with finality in due course.

422 U.S. at 852, emphasis added. This Court has not answered the question of whether a defendant "must be allowed to switch in midtrial."

This Court has clearly established only that there is a pretrial right to self-representation. In the absence of any law from this Court on whether a similar right exists midtrial, the Ninth Circuit's grant of habeas relief in this case was manifestly in contravention of the AEDPA. This case is an example of a circuit court disagreeing with a state court on an issue as to which this Court has provided no clear guidance – precisely the situation in which Congress, through AEDPA, intended to foreclose habeas relief.

II.

THE PUBLISHED DECISION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND OF CALIFORNIA COURTS, WHICH FIND NO CLEARLY ESTABLISHED CONSTITUTIONAL RIGHT TO ELECT SELF-REPRESENTATION MIDTRIAL UNDER *FARETTA*

A necessary premise to finding that a state court decision is contrary to clearly established federal law is a finding that there actually exists clearly established law against which the state court decision can be measured. Other courts reject the premise that this Court has ever held that a defendant can discharge his appointed counsel in the middle of trial so that he may proceed pro se.

In *United States v. Dunlap*, 577 F2d 867 (4th Cir. 1978), the court addressed the defendant's claim that he should have been allowed to dismiss his attorney and conduct his own closing argument:

> *Faretta*, although clarifying the Sixth Amendment right of self-representation, *did not deal with the situation where the defendant attempts to dismiss counsel and proceed pro se after trial has begun*. The facts of *Faretta* reveal that "well before the date of the trial, . . . Faretta requested that he be permitted to represent himself. . . ." 422 U.S. at 807. Such being the facts of *Faretta*, *that case does not directly control the issue here*. . . .

Id. at 869, emphasis added. Because *Faretta* was silent on the point, the Fourth Circuit concluded: " we nevertheless hold that a defendant does not have an absolute right to dismiss counsel and conduct his own defense after the trial has commenced." *Id.* at 868. See also *Jermyn v. Horn*, 266 F.3d 257, 289-290 (3d Cir. 2001) (the court found that the state court was not unreasonable under AEDPA in denying a midtrial request for self-representation, in part because "[a]fter trial has

commenced, the right of self-representation is curtailed. . . ." quoting *Buhl v. Cooksey*, 233 F.3d 783, 791 (3d Cir. 2000).)

Interestingly, the Ninth Circuit itself has previously recognized that the question of midtrial requests was not clearly established, but was in fact left open by this Court's jurisprudence. *Moore v. Calderon*, 108 F.3d 261, 264-265 (9th Cir. 1997) (finding that the pretrial nature of Faretta's request is properly considered necessary to the decision, and therefore a holding of this Court).

While the federal appellate courts have acknowledged that the question of a midtrial right to self-representation remains open, the California Supreme Court has affirmatively held that midtrial requests do not implicate the constitution at all. In *People v. Bloom*, 48 Cal.3d 1194, 1220 (1989), that court observed that although a trial court has no discretion to deny a pretrial request for self-representation so long as the defendant is competent,

> [a] request for self-representation asserted for the first time after trial has commenced, on the other hand, is based on nonconstitutional grounds and is addressed to the sound discretion of the trial court.

Id., internal citations and quotations omitted. The California Supreme Court's holding cannot be reconciled with the Ninth Circuit's premise in this case that there is clearly established law establishing a constitutional right to elect self-representation in the middle of trial.

The Ninth Circuit found that the trial court violated clearly established law from this Court when it denied the midtrial request for self-representation. However, that same Ninth Circuit, and several other state and federal courts, have found that there is no clearly established law from this Court governing such requests. This Court should clarify the scope of its prior holdings and delineate whether such a right exists under the federal Constitution once trial has commenced, and whether that right has been clearly established.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: March 9, 2004

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MEGAN VAN LYNN, *Petitioner-Appellee*, D.C. No. v. TEENA FARMON, Warden, *Respondent-Appellant*	No. 03-15221 CV-98-01715-FCD(JFM) OPINION

Appeal from the United States District Court
for the Eastern District of California
Frank C. Damrell, Jr., District Judge, Presiding

Argued and Submitted
August 15, 1003—San Francisco, California

Filed October 17, 2003

Before: Stephen Reinhardt and Susan P. Graber,
Circuit Judges, and John S. Rhoades,* District Judge.

Opinion by Judge Rhoades;
Concurrence by Judge Graber

OPINION

RHOADES, District Judge:

Respondent Warden Teena Farmon ("Warden Farmon") appeals the district court's judgment granting petitioner Megan Van Lynn's ("Van Lynn") petition for writ of habeas corpus on the ground that Van Lynn was denied her *Sixth Amendment* right to represent herself at trial and received ineffective assistance of appellate counsel because her counsel failed to raise this issue on direct appeal.

We conclude that where a state court reasons that a defendant is not competent to represent herself simply because she will be unable to present her defense in an informed, reasonable, or intelligent manner, that decision is contrary to clearly established Supreme Court case law. We cannot avoid granting the writ pursuant to 28 U.S.C. § 2254(d)(1) by positing an alternative reason for the state court's denial of the motion for self-representation that is entirely distinct from the reason given by the state court, even if such different reason might have justified the state court's action. We therefore affirm.

I. *Background*

On November 28, 1991, Van Lynn's home suffered major fire damage. On December 9, 1993, Van Lynn was convicted of one count of arson of an inhabited structure, one count of arson of property with the intent to defraud, and one count of insurance fraud. On January 1994, Van Lynn was sentenced to a 14-year state prison term.

During the third week of her trial, Van Lynn moved to substitute counsel pursuant to *People v. Marsden*, 465 P.2d 44, 84 Cal. Rptr. 156 (Cal. 1970). That motion was denied. Van Lynn then moved to represent herself pursuant to *Faretta v.*

California 422 U.S. 806, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975). Although the trial court initially expressed some concern about the timing of Van Lynn's *Faretta* request, the court granted this motion. Only subsequently, after further questioning Van Lynn about her qualification and eliciting the response from her that she did not consider herself capable or competent to represent herself did the court retract its decision and deny the motion. Van Lynn, incidentally, had serious reservations about the capability and competence of her counsel as well.

Van Lynn argues in her petition for writ of habeas corpus that the trial court violated her Sixth Amendment right to self-representation when it denied her *Faretta* motion. Van Lynn also argues that her appellate counsel was ineffective for failing to raise this issue on direct appeal. Finally, Van Lynn argues that application of a sentence enhancement violated her constitutional right to due process because the prosecution failed at trial to present sufficient evidence to support this enhancement.

The district court granted Van Lynn's petition on the ground that denial of Van Lynn's *Faretta* motion violated her *Sixth Amendment* rights. Warden Farmon timely appealed. We affirm.

II. *Analysis*

A. Applicable Standards

We review de novo the district court's decision to grant or deny a petition for writ of habeas corpus. *Clark v. Murphy*, 331 F.3d 1062, 1067 (9th Cir. 2003), *petition for cert filed*, ___ U.S.L.W. ___ (U.S. Sept. 8, 2003) (No. 03-372). Pursuant to 28 U.S.C. § 2254(d), we review the state court's decision to determine whether the state court's adjudication of the claim "resulted in a decision that was contrary to, or involved an

unreasonable application of, clearly established" Supreme Court case law or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Here, there is no contention that the state-court decision resulted in an unreasonable determination of the facts. Thus, we consider whether the state-court decision resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Supreme Court case law.

"Contrary to" and "unreasonable application of" have "distinct meanings" as used in § 2254(d)(1). *Clark*, 331 F.3d at 1067; *see also Williams v. Taylor*, 529 U.S. 362, 404, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000). A decision is "contrary to" clearly established Supreme Court case law "if it fails to apply the correct controlling authority, or if it applies the controlling authority to a case involving facts materially indistinguishable from those in a controlling case, but nonetheless reaches a different result." *Clark*, 331 F.3d at 1067. A state-court decision is also "contrary to" Supreme Court case law if the state court "'applies a rule that contradicts the governing law set forth in'" Supreme Court cases. *Early v. Packer*, 537 U.S. 3, 8, 154 L. Ed. 2d 263, 123 S. Ct. 362 (2002) (per curiam) (quoting *Williams*, 529 U.S. at 405). In contrast, "[a] state court's decision involves an unreasonable application of federal law if 'the state court identifies the correct governing legal principle . . . but unreasonably applies that principle to the facts of the prisoner's case.'" *Clark*, 331 F.3d at 1067 (quoting *Williams*, 529 U.S. at 413).

In conducting our review, we look to the last reasoned state-court decision. See *Franklin v. Johnson, 290 F.3d 1223, 1233 n.3 (9th Cir. 2002)*. Because, here, neither the court of appeal nor the California Supreme Court issued a reasoned opinion on the merits of this claim, we look to the trial court's decision.

B. *The State-Court Decision was Contrary to Clearly Established Supreme Court Law*

Initially, Van Lynn requested new counsel under *People v. Marsden*. The trial court denied this request. Van Lynn then stated that she could do a better job of representing herself than her present counsel. When the trial court asked her about her qualifications, Van Lynn answered that she had none. There was more discussion about her present attorney's representation, and the trial court again denied Van Lynn's *Marsden* motion. The following colloquy then occurred:

Court: It sounds as if you are not pursuing a request to represent yourself under *People v. Faretta*?

Van Lynn: If that's my only other option, yes.

Court: Yes, what?

Van Lynn: Yes, I will.

Court: You wish to represent yourself?

Van Lynn: I don't know what else to do.

Court: What are your qualifications?

Van Lynn: None, your Honor.

Court: Well, it would be clearly error if I were to allow you to represent yourself given that circumstance.

The trial court again questioned Van Lynn about her qualifications, and Van Lynn again stated she had none. A few

minutes later, the trial court asked Van Lynn if she had any training in the law, to which she answered that she had taken a couple of business law courses and that she was intelligent and attentive to details. The trial court then took a short recess. After the recess, the trial court announced:

> Court: I am truly troubled by this morning's proceedings. I am truly troubled by the extent to which or the point to which this matter has proceeded. And, frankly, I have some real question as to why this motion is being brought in the third week of a four week trial, or estimated to be four weeks.
>
> I'm going to deny your request. I'm going to allow you to represent yourself from this point forward.[1/] And I'm going to appoint Mr. Root as co-counsel, slash, standby counsel. And the jury will be advised of that fact.

Van Lynn's attorney then reminded the trial court that there are certain questions a defendant must be asked before granting a *Faretta* motion. The trial court then asked Van Lynn whether she understood that it is generally not wise for a defendant to represent herself in a criminal matter, whether she understood the penalty she was facing, and whether she understood that the trial court could not help her during the proceedings. The trial court then for a third time questioned Van Lynn regarding her qualifications to represent herself. Specifically, the following colloquy occurred:

---

1. Although not a model of clarity, the only fair reading of these two sentences is that the trial court was denying Van Lynn's motion for new counsel pursuant to Marsden but granting her motion for self-representation pursuant to *Faretta*.

Court: Well, in terms of your qualifications, then to represent yourself what are you providing to the court as a basis apart from a deep -- a deep-seated belief in that a different set of tactics ought to be employed in terms of pursuing this case?

Van Lynn: I don't know. I'm sorry. I don't know.

Court: But you feel that you are capable and competent to represent yourself in these proceedings?

Van Lynn: No, I don't. I just don't think that Mr. Root is either.

Court: Well, then I'm going to vacate that decision. Mr. Root, you're to proceed, continue as counsel in this matter.

I don't believe, and I, frankly, am very concerned that were you to attempt to represent yourself in this matter, Miss Van Lynn, that your insistence upon a certain tactical selection may well work to your decided disadvantage. And I don't believe you have the background upon which you can make that judgment in a fashion that the law would require.

So, I'm going to deny the motion under *Marsden*. Deny the motion under *Faretta*.

[1] Although the trial court stated at one point that it had "some real question as to why" the motion was being brought during the third week of the trial, the trial court subsequently granted the motion for self-representation and did not reverse its

decision that Van Lynn could represent herself until after she indicated that she did not think that she was "capable and competent" to do so. Moreover, after reversing its decision, the trial court explained that it was "very concerned" that if Van Lynn represented herself, her choice of tactics might work to her disadvantage. The trial court also stated that it did not believe that she had the background that would allow her to make a judgment regarding her trial tactics "in a fashion that the law would require." In light of the foregoing, we are firmly convinced that the trial court denied Van Lynn's motion to represent herself solely on the ground that Van Lynn was not "competent" to represent herself because she would be unable to present her case in an informed, reasonable and intelligent manner. We now turn to the issue of whether the trial court's decision was contrary to, or involved an unreasonable application of, clearly established Supreme Court case law.

[2] Over two years before Van Lynn's conviction became final, the Supreme Court in *Godinez v. Moran*, 509 U.S. 389, 125 L. Ed. 2d 321, 113 S. Ct. 2680 (1993) held that the competency standard for self-representation is the same as the standard for standing trial. Thus, to be competent to represent herself, a defendant must simply have a "rational understanding" of the proceedings. *See* id. at 397-98. The Supreme Court rejected arguments in favor of a higher standard, explaining that "the competence that is required of a defendant seeking to waive his right to counsel is the competence to waive the right, not the competence to represent himself." *Id. at 399*. The *Godinez* Court explained:

> In *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), we held that a defendant choosing self-representation must do so "competently and intelligently," *id.*, at 835, 95 S. Ct., at 2541, but we made it clear that the defendant's "technical legal knowledge" is "not relevant" to the determination whether he is

> competent to waive his right to counsel, *id.*, at 836, 95 S. Ct., at 2541, and we emphasized that although the defendant "may conduct his own defense ultimately to his own detriment, his choice must be honored," *id.*, at 834, 95 S. Ct., at 2541. Thus, while "it is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts, ibid., a criminal defendant's ability to represent himself has no bearing upon his competence to choose self-representation.

509 U.S. at 399-400.

[3] Here, the trial court not only failed to apply the legal principle, set forth in *Godinez*, that a defendant is competent to represent herself when she has a "rational understanding" of the proceedings, but the trial court proceeded to apply a legal principle regarding competency to waive counsel that was specifically rejected by the Supreme Court in *Godinez*. Consequently, the state court's decision was "contrary to" clearly established Supreme Court case law within the meaning of *§ 2254*. See *Clark*, 331 F.3d at 1067 (a decision is "contrary to" clearly established Supreme Court case law "if it fails to apply the correct controlling authority"); *Williams*, 529 U.S. at 405 (a state-court decision is "contrary to" Supreme Court case law if the state court " 'applies a rule that contradicts the governing law set forth in" Supreme Court cases).

Warden Farmon nonetheless argues that Van Lynn's request for self-representation was properly denied because "denial of such an untimely request was neither contrary to nor an unreasonable application of *Faretta* and its progeny, because the Supreme Court has never held that the right to self-representation can be exercised in the middle of trial." We need not decide whether a denial of Van Lynn's motion on timeliness grounds would have been contrary to, or involved an

unreasonable application of, clearly established Supreme Court case law because nothing in the record suggests that the trial court denied Van Lynn's motion on timeliness grounds. Moreover, nothing in the record suggests that the trial court would have denied the motion on timeliness grounds had it believed that Van Lynn was competent to represent herself. In fact, as noted, the trial court initially granted the motion for self-representation and denied it only after it concluded that Van Lynn was not qualified to represent herself.

[4] Moreover, we decline Warden Farmon's invitation to (1) disregard the fact that the state court applied a legal principle regarding competency to waive counsel that contradicts the governing law set forth in *Godinez*; (2) invent an alternative rationale for the state court's decision which requires application of an entirely different and unrelated legal principle (one regarding timeliness); and then (3) review the trial court's decision as if it had been made pursuant to that alternative rationale. Nothing in the statute suggests that such a tack is permissible, and we conclude that it is not. Such a tack is contrary to *Early* and *Williams*, which establish that the requirement for granting a petition pursuant to the "contrary to" prong of § 2254(d)(1) is met where, as here, the state court "'applies a rule that contradicts the governing law set forth in'" Supreme Court cases. *Early*, 537 U.S. at 8 (quoting *Williams, 529 U.S. at 405*). Such a tack is also contrary to *Early*'s pronouncement that a state-court decision is not "contrary to" clearly established Supreme Court precedents "so long as neither the reasoning nor the result of the state-court decision contradicts them." 537 U.S. at 8 (second emphasis added).

[5] Thus, following *Early*, we conclude that where a state court holds, as it did here, that a defendant is not *competent* to represent herself based on the application of a legal principle that contradicts the governing legal principle on competency set forth in clearly established Supreme Court case law, a federal

court may not avoid granting habeas relief by positing an alternative reason for the state court's decision that might have enabled the state court to reach the same result, where the record reveals that the state court did not base its decision on that alternative reason.

III. *Conclusion*

[6] Here, the state court framed the issue before it as whether Van Lynn was competent to waive her right to counsel and represent herself. The state court applied a standard for assessing Van Lynn's competency to represent herself that had previously been rejected by the Supreme Court, and therefore the state court's adjudication of the claim resulted in a decision that was contrary to clearly established Supreme Court law. Under these circumstances, we may not posit alternative reasons for the state court's decision. Accordingly, we conclude that the standard for granting the writ pursuant to *§ 2254(d)(1)* has been met. In light of our holding, we need not reach the other issues raised in this appeal.

[7] The decision of the district court is **AFFIRMED**.

GRABER, Circuit Judge, concurring:

I concur because the state court expressly reasoned to its decision in a manner that contradicted express Supreme Court reasoning on the same legal issue. In this way the state court's decision was "contrary to" established Supreme Court case law, 28 U.S.C. § 2254(d)(1). See *Early v. Packer*, 537 U.S. 3, 8, 154 L. Ed. 2d 263, 123 S. Ct. 362 (2002) (per curiam).

I write separately to note that a denial on timeliness grounds of a *Faretta*[1] motion made in the third week of a four-week trial would neither have been contrary to, nor have involved an unreasonable application of, clearly established Supreme Court case law. Applying Supreme Court precedent, we have held that there is no mid-trial *Faretta* right. *United States v. Bishop*, 291 F.3d 1100, 1114 (9th Cir. 2002), cert. denied, 537 U.S. 1176, 154 L. Ed. 2d 920, 123 S. Ct. 1002 (2003); *United States v. Smith*, 780 F.2d 810, 811 (9th Cir. 1986) (per curiam). A state-court decision that reached the same conclusion would not entitle a defendant to habeas relief under 28 U.S.C. § 2254(d)(1). The state court's decision in this case, however, cannot fairly be read to have rested on the ground of timeliness.

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1. *Faretta v. California, 422 U.S. 806, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975).*

APPENDIX B

FILED

JAN - 9 2003

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

By _____
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

MEGAN VAN LYNN,

Petitioner, No. CIV-S-98-1715 FCD JFM P

vs.

TINA FARMON, Warden,

Respondent. ORDER

_____/

Petitioner, a state prisoner proceeding pro se, has filed this application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(l)(B) and Local General Order No. 262.

On October 22.2002, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the

findings and recommendations were to be filed within twenty days. Respondent has filed objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. $636(b)(l)(C) and Local Rule 72-304, this court has conducted a de novo review of this case. Having carefully reviewed theentire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed October 22, 2002, are adopted in full;

2. Petitioner's application for writ of habeas corpus is granted; and

3. Petitioner shall be released from custody within thirty days of this order unless the appropriate authority elects to retry petitioner.

Dated: January 8, 2003

/s/

UNITED STATES DISTRICT JUDGE

APPENDIX C

FILED

OCT 22 2002

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

By_____
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

MEGAN VAN LYNN,

Petitioner, No. CIV-S-98-1715 FCD JFM P

vs.

TINA FARMON, Warden,

Respondent. FINDINGS AND RECOMMENDATIONS

_____/

Petitioner is a state prisoner proceeding through counsel with an application for writ of habeas corpus pursuant to 42 U.S.C. § 1983. On December 9, 1993, petitioner was convicted of two counts of arson and one count of insurance fraud. Petitioner appeals her convictions and sentence.

HABEAS STANDARDS

An application for writ of habeas corpus by a person in custody pursuant to the judgment of a state court can only be granted for violations of Constitution or the laws of the United States. 28 U.S.C. § 2254 (a).

Federal habeas corpus relief is not available for any claim decided on the merits in state court proceedings unless the state court's adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Section 2254(d)(2) applies only to factual determinations, while section 2254(d)(1) applies to questions of law and mixed questions of law and fact. Van Tran v. Lindsey, 212 F.3d 1143, 1150 (9th Cir. 2000) cert. denied, 531 US. 944 (2000). Petitioner's claims of ineffective assistance of counsel present mixed questions of law and fact and are governed by the standards in § 2254(d)(l). Id. at 1149-50.

"A state court decision is 'contrary to' federal law if it 'failed to apply the correct controlling authority from the Supreme Court.'" Avila v. Galaza, 297 F.3d 91 1,918 (9th Cir. 2002) [quoting Shackleford v. Hubbard, 234 F.3d 1072, 1077 (9th Cir. 2000), cert. denied, 122 S. Ct. 324 (2001); also citing Williams v. Taylor, 529 U.S. 362,405-07 (2000)].

A state court decision involves an "unreasonable application" of federal law "when the state court's application of clearly established federal law is objectively unreasonable." Shackleford, 234 F.3d at 1077. A state court's application of federal law is "objectively unreasonable" when it is "clearly erroneous," that is, where the federal court is "left 'with a "firm conviction" that one answer, the one rejected by the [state] court, was correct and the other, the application of the federal law that the [state] court adopted, was erroneous. . . .'" Shackleford, id. (quoting Van Tran, 212 F.3d at 1152-54).

The court looks to the last reasoned state court decision as the basis for the state court judgment. Avila, 297 F.3d at 918; see also Packer v. Hill, 291 F.3d 569, 578 (9th Cir. 2002). The court considers first whether the state court decision was erroneous. Van Tran, 212 F.3d at 1155. If the court finds error, it then considers whether the error violates the standards set forth in § 2254(d)(l). See id. Where there is no reasoned state court decision, as in this case, the federal court conducts an independent review of the record to determine whether the state court clearly erred in its application of federal law. See Delgado v. Lewis, 223 F.3d 976,982 (9th Cir. 2000).

I. Background

On December 9, 1993, petitioner was convicted of one count each of: (1) arson of an inhabited structure; (2) arson of property with the intent to defraud; and (3) insurance fraud. Petitioner's jury found that petitioner had intentionally set fire to her own house and then submitted an insurance claim in which she falsely represented that she not caused the fire. The jury also found that the loss caused by the arson exceeded $50,000.

On January 7, 1994, petitioner was sentenced to fourteen years in the California Department of Corrections; eight years for arson of an inhabited structure enhanced by: (1) five years

due to a prior felony conviction; and (2) one year because of the high monetary amount of the damage caused. Sentences for arson of property with the intent to defraud and insurance fraud were stayed. Petitioner was also ordered to pay $12,495 in restitution to a "fire restoration company" (Pet. at 20.) that stored petitioner's belongings damaged by the fire.

II. Excess Damages Enhancement

Petitioner's eight year prison sentence for arson of an inhabited structure was enhanced by one year pursuant to California Penal Code § 12022.6 which provides additional penalties based on the amount of monetary damage caused during arson. Petitioner claims that this enhancement violates her constitutional right to due process because, at trial, the prosecution failed to present sufficient evidence to support the enhancement. Petitioner also claims that her attorneys failure to raise this issue at trial or on direct appeal amounts to ineffective assistance of counsel in violation of the Sixth Amendment.

California Penal Code § 12022.6 reads (in part):

> a) When any person takes, damages, or destroys any property in the commission or attempted commission of a felony, with the intent to cause that taking, damage, or destruction, the court shall impose an additional term as follows:
>
> > (1) If the loss exceeds fifty thousand dollars ($50,000), the court, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which the defendant has been convicted, shall impose an additional term of one year.

Petitioner admits that the evidence at her trial established that she had caused more than $50,000 in damage. However she

believes that her sentence should not have been enhanced pursuant to $ 12022.6 because it was her property that was damaged. In support of this, petitioner points to subsection (b) of § 12022.6, which reads:

> b) In any accusatory pleading involving multiple charges of taking, damage, or destruction, the additional terms provided in this section may be imposed if the aggregate losses to the victims fromall felonies exceed the amounts specified in this section and arise from a common scheme or plan. All pleadings under this section shall remain subject to the rules of joinder and severance stated in Section 954.

Petitioner claims the reference to "the victims" in the third line of subsection (b) means that § 12022.6 only applies if damage is caused to property owned by a second party.

Petitioner was not charged with, nor found guilty under subsection (b), only subsection (a). When trying to determine the meaning of statutory language, "the plain meaning of the statute controls." DeGeorge v. U.S. Dist. Court for Cent. Dist. of Colorado, 219 F.3d 930, 936-37 (9th Cir. 2000). Since there was suflicient evidence to find petitioner guilty under section (a) her claims concerning California Penal Code § 12022.6 must be rejected.[1/]

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1. Even if the court accepted petitioner's argument that subsection (b) implies that a conviction under subsection (a) can only stand if damage was done to "victims," the court notes that petitioner submitted an insurance claim for approximately $65,000. While the insurance company only paid petitioner approximately $25,000, petitioner is not entitled to escape punishment merely because her criminal objective was not fulfilled. See People v. Ramirez, 109 Cal.App.3d 529, 539-40 (1980) (the California Legislature did not intend that the application of section 12022.6 should depend upon the fortuitous circumstances of whether stolen property was recovered).

III. Restitution

Petitioner asserts that the trial court's order that she pay $12,495 in restitution to a company which held her fire-damaged belongings constitutes a violation of due process, and that her attorneys were ineffective for failing to raise this claim at trial or on direct appeal in violation of the Sixth Amendment.

Title 28 U.S. § 2254 (a) reads:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Petitioner's claim concerning restitution does not concern whether she is "in custody." Accordingly, the court is not conferred jurisdiction by § 2254 to hear petitioner's restitution claim.

IV. Faretta

Petitioner's trial began on November 4, 1993. On the tenth day of trial, after twelve of the prosecution's sixteen witnesses had testified, petitioner indicated to the court that she had become dissatisfied with the representation she was receiving, and that she wished to have new counsel. The court denied petitioner's motion for appointment of new counsel. Petitioner then asked that she be allowed to proceed pro se. Initially, the trial judge granted petitioner's request. However the judge quickly changed his mind because he did not believe that petitioner possessed the skills necessary to adequately defend

herself. (Pet.; Ex A. 992-1003). Petitioner argues the court's decision not to let her proceed pro se was a violation of the Sixth Amendment.

The seminal case concerning the Sixth Amendment right to self-representation is Faretta v. California, 422 U.S. 806 (1975):

> The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be "informed of the nature and cause of the accusation," who must be "confronted with the witnesses against him," and who must be accorded "compulsory process for obtaining witnesses in his favor." Although not stated in the Amendment in so many words, the right to self-representation--to make one's own defense personally--is thus necessarily implied by the structure of the Amendment. [Footnote omitted.] The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.

Id. at 819-820.

The basic rule which follows from Faretta is that a criminal defendant must be allowed to represent himself as long as he knowingly and intelligently elects to do so. Id. at 835. The Supreme court clarified the meaning of this rule in Godinez v. Moran, 509 U.S. 389, 399 (1993) when it held "the competence that is required of a defendant seeking to waive his right to counsel is the competence to waive the right, not the competence to represent himself."

The United States Court of Appeals for the Ninth Circuit has interpreted Faretta to also require that a request for self-representation be timely, not for the purpose of delay, and

unequivocal. United States v. Hernandez, 203 F.3d 614,620 (9th Cir. 2000).

In this circuit, a Faretta request is timely if made before jury impanelment, "unless it is shown to be a tactic to secure delay." Fritz v. Spalding, 682 F.2d 782,784 (9th Cir. 1982). This does not mean that a request for self-representation made after the jury has been empaneled must be denied as a matter of law. After all, the purpose of the timeliness rule is designed to "minimiz[e] disruptions and maintain [ ] continuity at trial." Chapman v. United States, 553 F.2d 886, 893 (5th Cir. 1977) [cited in United States v. Kizer, 569 F.2d 504, 507 (9th Cir. 1978)]. In fact, in U.S. v. Kaczynski, 239 F.3d 1108, 1116 n. 11 (9th Cir. 2001) the Ninth Circuit acknowledged that the parties therein disputed whether the jury was empaneled when Mr. Kaczynski requested to proceed pro se, but the Ninth Circuit elected not to resolve this question assuming that the request to proceed pro se was not untimely unless it was made for purposes of delay.

The court has reviewed the entire record in this matter and finds that it is clear that petitioner's Sixth Amendment right to represent herself has been violated. There is nothing in the record to suggest (nor does respondent argue) that petitioner's request to proceed pro se was unintelligent or involuntary. The trial court denied petitioner's request for an impermissible reason; because the court did not feel that petitioner had the legal skill to adequately defend herself. Petitioner's request to proceed pro se was unequivocal. In the record it is clear that petitioner informed the court that she either wished to have new counsel appointed, or proceed alone. (Pet.; Ex A. 992-1003.) Finally, while petitioner did not make her request to proceed pro se until well after the jury had been empaneled, the trial court did not find that petitioner's motion was made for purposes of delay and nothing in the record supports such a conclusion. As the court considered wether to grant petitioner's motion, it failed

to express any concern with how granting the motion might slow the pace of the trial.

Petitioner also argues that counsel on direct appeal was ineffective for failing to raise the Faretta issue discussed above. To demonstrate ineffective assistance of appellate counsel, petitioner must demonstrate: (1) that his counsel was objectively unreasonable in failing to find arguable issues to appeal; and (2) a reasonable probability that, but for his counsel's unreasonable failure to find such issues, he would have prevailed on his appeal. Smith v. Robbins, 528 U.S. 259,285 (2000). Because the rationale given by the trial court in denying petitioner's Faretta motion was clearly erroneous and because petitioner's convictions must now be reversed, see Faretta v. California, 422 U.S. at 836, petitioner was subjected to ineffective assistance of appellate counsel.

V. Conclusion

For all the foregoing reasons, petitioner's application for writ of habeas corpus should be granted.

Accordingly, IT IS HEREBY RECOMMENDED that:

1. Petitioner's application for a writ of habeas corpus be granted; and

2. Petitioner be released from custody within thirty days of any order adopting these findings and recommendations unless, within that period of time, the appropriate authority elects to retry petitioner.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within twenty days after

being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 95 1 F.2d 1 153 (9th Cir. 1991).

DATED: October 21, 2002.

/s/*/------/

UNITED STATES MAGISTRATE JUDGE

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